DOCUMENT RESUME

ED 295 267 CS 506 219

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TITLE The Falwell v. Flynt and Ollman v. Evans Cases: A Deleterious Effect on Broadcast Commentary?
PUB DATE Jul 88
NOTE 25p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (71st, Portland, OR, July 2-5, 1988).
PUB TYPE Speeches/Conference Papers (150) -- Reports - Evaluative/Feasibility (142)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Constitutional Law; *Court Litigation; *Editorials; Federal Courts; Journalism; Legal Problems; Mass Media Effects; *Press Opinion
IDENTIFIERS Broadcast Journalism; Common Law; *Falwell v Flynt; First Amendment; Journalists; Libel; *Ollman v Evans; Supreme Court

ABSTRACT

This paper examines recent court decisions that indicate the extent of constitutional protection extended to opinionated statements made during broadcast commentaries. A brief overview of both the common law and constitutional privileges protecting the expression of opinion is also included in the paper. Specifically, the paper evaluates the effect a United States Supreme Court ruling in Falwell v. Flynt may have on broadcast commentary. The paper discusses the test to distinguish between fact and opinion as set forth in Ollman v. Evans. This test encourages that: (1) the meaning of the specific language of the challenged statement be analyzed to determine whether the statement has a precise meaning for a consensus or is ambiguous; (2) the statement be capable of proof or disproof; (3) the context in which the statement appears be examined; and (4) the broader context in which the statement appears also be examined. The paper concludes that broadcast commentators have been extended a considerable degree of constitutional protection for their opinionated statements although that protection is by no means absolute. Sixty-six notes are included. (Author/MS)

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THE FALWELL V. FLYNT AND OLLMAN V. EVANS CASES: A DELETERIOUS EFFECT ON BROADCAST COMMENTARY?

For

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ABSTRACT

This paper examines recent court decisions that indicate the extent of constitutional protection extended to opinionated statements made during broadcast commentaries. A brief overview of both the common law and constitutional privileges protecting the expression of opinion is included. Specifically, the paper evaluates the effect a pending U.S. Supreme Court ruling in Falwell v. Flynt may have on broadcast commentary. The test to distinguish between fact and opinion as set forth in Ollman v. Evans is discussed. Ollman's Four-Factor Test encourages that the meaning of the specific language of the challenged statement be analyzed to determine whether the statement has a precise meaning for a concensus or is ambiguous; that the statement be capable of proof or disproof; that the context in which the statement appears be examined; and that the broader context in which the statement appears also be examined. The study concludes that broadcast commentators have been extended a considerable degree of constitutional protection for their opinionated statements although that protection is by no means absolute.

ABSTRACT

This paper examines recent court decisions that indicate the extent of constitutional protection extended to opinionated statements made during broadcast commentaries. Specifically, the paper evaluates the effect a pending U.S. Supreme Court ruling in Falwell v. Flynt may have on broadcast commentary and details the effects on broadcast commentary cases from a test to distinguish between fact and opinion as set forth in Ollman v. Evans. The study concludes that broadcast commentators have been extended a considerable degree of constitutional protection for their opinionated statements although that protection is by no means absolute.

THE FALWELL V. FLYNT AND OLLMAN V. EVANS CASES: A DELETERIOUS EFFECT ON BROADCAST COMMENTARY?

Nothing could be more threatening to the tradition of broadcast commentary than a cause of action on the part of public figures for emotional distress. That threat looms now before the U.S. Supreme Court where oral arguments in the Falwell v. Flynt[1] case were heard in December 1987 and a decision is expected during Summer 1988. The Falwell suit is important to broadcast commentators, as are other print publication suits, by analogy since the long litany of case law surrounding libel actions is rooted in the print medium but is applicable to broadcast commentary or televised editorial opinions that are read from a text.

Rev. Jerry Falwell initiated the lawsuit against Larry Flynt, publisher of Hustler magazine, alleging libel, invasion of privacy, and intentional infliction of emotional distress. The trial court dismissed the privacy action, and the jury rejected libel. However, Falwell prevailed on the intentional infliction of emotional distress claim for a cartoon that satirized a liquor advertisement which employs celebrities discussing their "first time" with the liquor, with an obvious sexual double entendre. In the Hustler parody, Falwell is the celebrity interviewed about his "first time," an event depicted to have occurred in an outhouse with his mother. Falwell's mother is portrayed as habitually drunk and immoral, and Falwell as a hypocrite and drunkard.

The libel claim was rejected because the jury found that no reader could reasonably believe the parody described actual facts and that the parody was opinion, and thus, constiutionally protected.[2] On appeal, however, the Fourth Circuit Court of Appeals awarded damages to Falwell, thus allowing the

intentional infliction of emotional distress claim by a public figure to stand.[3] The Fourth Circuit opinion, if upheld by the U.S. Supreme Court, could have serious implications for broadcast commentators since imposition of liability on satirical attack of a public figure may circumvent the free marketplace and robust debate ideas now protected by the First Amendment and undermine the balancing of individual rights and free speech created by the U.S. Supreme Court in New York Times Co. v. Sullivan.[4] The U.S. Supreme Court has made it clear that recovery for political figures should be limited to the malicious infliction of defamatory falsehood as set forth in the Sullivan ruling. Thus, the possibility that a controversial political figure such as Rev. Falwell could file suit and recover damages for emotional distress, when a jury has found no false statement of fact, no libel and no damage to reputation, would undermine political debate and would amount to the erosion of First Amendment protection for purveyors of opinion ranging from political cartoonists to broadcast commentators.

While the Falwell v. Flynt case bears watching, other potential threats to the tradition of broadcast commentary exist. Those threats are in the form of recent court rulings from the print medium which, by analogy, affect televised editorials or broadcast commentary that is read from a text. The rulings, all from the 1980s, indicate that broadcast commentary, though often perjorative, ordinarily does not generate successful libel actions. The Ollman v. Evans[5] case is dealt with at much greater length than the Falwell case since a body of case law has developed since the Ollman ruling was issued in 1984, while the Falwell decision is pending before the U.S. Supreme Court.

Because the focus of libel litigation has shifted from its common law origins to First Amendment considerations, the broadcast commentator is afforded constitutional protection for most opinionated statements.[6]

Protection is traceable to the common law privilege of fair comment which protected the right of every citizen critic, including the media opinion writer, to fairly express opinions and to comment upon all matters of public interest and general concern.[7] Such comment had to be free of malice under the common law to be fair and reasonable; for example, it must not be made solely for the purpose of causing harm to the person about whom the comment was made, and it must be a statement of opinion and not a misstatement of fact.[8]

The common law privilege protecting opinionated statements was largely constitutionalized by the Sullivan "actual malice" rule in 1964,[8] but the real impetus for the shift away from the fair comment privilege came ten years later when the Supreme Court in Gertz v. Robert Welch, Inc.[9] said in a statement not necessary to the decision:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[10]

This declaration, while removing the qualifications and/or conditions of the common law privilege, appears to raise the problematic fact-opinion distinction to the level of constitutionality without affording an analytical approach for the lower courts to follow.[11]

In the Ollman case, the U.S. Court of Appeals, District of Columbia Circuit, attempted to provide a set of guidelines by creating "four factors" to be used in assessing whether the average reader would view a publication as a statement of fact or an expression of opinion. Because states declare broadcast defamation as libel or so liberalize the slander suit requirements

that there is little difference between libel and slander,[12] the Ollman case also has application to broadcast commentary.

This study will present a brief overview of both the common law and constitutional privileges protecting the expression of opinion. The various modes of analysis used in making the distinction between statements of fact and expression of opinion, including the D.C. Circuit's Ollman approach, also will be examined. Recent cases from 1984 forward will be reviewed to indicate problems inherent in making the fact-opinion distinction for broadcast commentators. The goal is to clarify for the radio/television commentator the scope of the privilege and protection afforded to comments about public issues and other matters of public concern.

The Common Law Privilege

Underlying the fair comment privilege was the assumption that the public was entitled to unrestrained and widely disseminated criticism, no matter how absurd.[13] There are two types of expression of opinion generally recognized by the courts. The first type is the so-called "pure type," which occurs when the broadcast commentator states the facts on which opinions are based. The pure type also occurs when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts. The second type is called the "mixed type" of expression in that it is apparently based on facts that have not been stated or cannot be assumed to exist by the parties to the communication. Common law privilege of fair comment has been held to apply only to the pure type of expression of opinion.[14]

The fair comment privilege requires that the courts make a distinction, therefore, between statements of opinion and statements of fact--whether

directly stated or assumed.[15] Courts and commentators, however, have not always agreed upon how such distinctions should be made.[16]

The Constitutional Privilege

The Supreme Court in Sullivan and its progeny generally has broadened protection afforded to the broadcast commentator under the "actual malice" rule, but the Court has failed to provide the lower court adequate guidance in regard to the fact-opinion distinction. Though disagreement exists, the general view is that the constitutional protection afforded expression of opinion under the Sullivan rule has extended the old common law doctrine of fair comment[17] and incorporated it into the constitutional privilege,[18] or at least left unsettled the question of whether the constitutional rule wholly supplanted the common law privilege.[19]

It was the Supreme Court's dictum in Gertz which has had the greatest impact upon the fact-opinion distinction. The Restatement (Second) of Torts notes that the Supreme Court's statement in Gertz, "under the First Amendment, there is no such thing as a false idea," indicates an expression of opinion cannot be the basis of a libel action involving public communication on a matter of public concern.[20]

Though private communications on private matters would fall beyond the constitutional privilege,[21] the logic of the constitutional principle would appear to apply to all expression of opinion based on either disclosed or assumed facts.[22]

After articulating the fact-opinion distinction, however, the Gertz Court made no effort to apply the distinction, leaving the lower courts to devise their own approaches.[24] The Court addressed the characterization of statements as fact or opinion in only two cases,[25] but both cases were decided

upon other grounds. Thus, despite the fact that the Gertz statement is clearly dicta, a majority of the federal circuit courts have accepted the statement as controlling law.[26] Some thirty-two states, in addition to the District of Columbia and Guam, also have recognized a constitutional privilege protecting expression of opinion.[27]

The Ollman Fact-Opinion Facts

Noting that the supreme court's "implicit command" in Gertz imposed upon both state and federal courts the duty of distinguishing fact from opinion in order "to provide opinions with the requisite, absolute first amendment protection,"[28] the Ollman court, in one of the most comprehensive decisions to date involving the fact-opinion distinction, set out a four-step approach to making such a distinction.

The case is based on a syndicated column written by Rowland Evans and Robert Novak concerning the appointment of Marxist professor, Bertell Ollman, to head the Department of Government at the University of Maryland. The Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed the decision of a three-judge panel, holding that the column was entitled to absolute First Amendment Protection as expression of opinion, based upon a four-part test for determining whether a statement is one of fact or opinion,[29] and finally the U.S. Supreme Court in May 1985 denied a petition for writ of certiorari to review the en banc decision.[30]

Two aspects of the 1984 case, which make it especially pertinent, are the nature of the Evans and Novak column which resulted in the libel action and the four factors set out by the court and how they were applied in determining the fact-opinion distinction.

The column at issue was published under the headline "The Marxist Professor's Intentions," and began with this statement:

> What is in danger of becoming a frivolous debate over the appointment of a Marxist to head the University of Maryland's department of politics and government has so far ignored this unspoken concern within the academic community: the avowed desire of many political activists to use higher education for indoctrination.[31]

The columnists also quoted an unnamed source as saying: "Ollman has no status within the profession, but is a pure and simple activist."[32]

Ollman alleged that the column was "totally false and defamatory" and that it denied his reputation as a scholar and portrayed him as a "political activist" who sought to use his classroom for ulterior purposes. Acknowledging that because of the "richness and diversity of language" it was difficult, even impossible, to lay down "bright-line" rule to distinguish between assertions of fact and expressions of opinion,[33] the court's majority set out a four-part test to be used in assessing whether the average reader would view such statements as fact or opinion.

First, the Ollman court said, the "common usage or meaning of the specific language of the challenged statement" should be analyzed to determine whether "the statement has a precise core of meaning for which a concensus of understanding exists, or conversely, whether the statement is indefinite and ambiguous."[34]

Second, courts "should consider the degree to which the statements are verifiable--is the statement objectively capable of proof or disproof?."[35] The court noted that the reason for such an inquiry is simple: "a reader cannot rationally view an unverifiable statement as conveying actual facts."[36]

Third, courts must examine the context in which the statement is made. The statement must be taken as part of a whole, including tone and the use of cautionary language. The court explained that the full context of the statement--the entire column or broadcast--must be considered "inasmuch as other, unchallenged language surrounding the allegedlly defamatory statement will influence the average reader's readiness to infer that a particular . . . statement has factual content."[37]

A fourth factor, the court said is consideration of "the broader context in which the statement appears." Different types of writing or commentary have "widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion."[38]

This four-factor analysis, the Ollman court noted, should not be followed "in rigid lock-step fashion." A logical starting point in applying the fact-opinion analysis might be the broad social context or setting within which the statement appears (the fourth step) and the language surrounding the challenged statements (the third factor).[39]

The court's majority decided that a "reasonable reader" who read the Evans and Novak column on the editorial page or Op-Ed page should be fully aware that the statements found there are not "hard" news and would be predisposed to regard what is found there to be opinion.[40] In analyzing specific allegations in the column, the court noted that the statement concerning Ollman's "status within the profession" was the "most troublesome" of all those alleged by Ollman to be defamatory. Still, the court found that a "confluence of factors" led to the conclusion that even those statements were protected opinion.[41]

Although all the statements in the column were found to be protected opinion, the court cautioned: "Of course, we do not hold that any statement

on an editorial or Op-Ed page is constitutionally privileged opinion."[42]

Broadcast News and Commentary

A considerable degree of protection has been granted by recent court rulings to opinions emanating from television and radio broadcasts, with ten of twelve decisions favorable to the news media.

In Lauderback v. ABC,[43] the court ruled as protected expression of opinion statements from a "20/20" television program which suggested that an investigation of fradulent sales of insurance policies amounted to unethical behavior. During the broadcast, such epithets as "rotten," "unethical," and "sometimes illegal" were used to describe the practices of agents who allegedly sold worthless policies. Agents other than the plaintiff, who are shown as defendants in criminal court proceedings, are referred to as "crooks" and "liars."[44]

The Lauderback court, in viewing the broadcast as a whole and relying on Gertz cita, said that "while allegations of specific criminal conduct generally cannot be protected as opinion, broad brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion."[45]

Furthermore, the court said there was full disclosure of the facts supporting accusations made during the broadcast.

Another ruling extending First Amendment protection for opinion was issued in Spelson v. CBS,[46] a case which involved a broadcast which alleged that a chiropractor practiced "cancer quackery." The broadcast referred to "untrained, unqualified and unscrupulous health practitioners" who exploit desperate patients by using "phony medical machines . . . to defraud patients."[47] An editorial comment referred to "con-artist," "cancer quacks,"

and said the broadcast has shown "unscrupulous charlatans victimizing cancer patients" with "phony cures."[48] Citing Gertz dicta, the court ruled the broadcasts were statements of opinion protected by the First Amendment.[49]

Constitutionally protected opinion also was granted to statements at issue in Redco Corp. v. CBA, Inc.,[50] a case involving comments aired on a "60 Minutes" television segment which implied, based upon disclosed truthful facts, that multi-piece tire rims are dangerous, and which reported opinions, also based on disclosed true facts, that tire rim manufacturers were concerned more with profits than with safety. In the broadcast of a segment entitled "Killer Wheels," the court reviewed statements in the total context of the broadcast and cited as controlling Gertz dicta and Restatement (Second) of Torts.

In six other recent cases, radio and television stations have won rulings when statements were contested as libelous. Those cases include Hallmark Builders v. Gaylord Broadcasting,[51] a case in which comments on a television broadcast about problems in the homebuilding industry that "home owners cry foul" and that "these were expensive homes with expensive problems" were ruled protected expression of opinion; Leader v. WSM, Inc.,[52] in which a public official's statements were ruled as protected opinion which asserted during a television broadcast that "most criminals are repentant after they're caught," that "later on they seem to return to the mold a lot of times," and that plaintiff's "conduct is such that I don't think he is going to change;" Motsinger v. Kelly,[53] in which remarks by a radio call-in show host that the caller was the "ugliest man in Danville" were ruled as protected expressions of opinion incapable of being proven false; New Deal Restaurant v. WPIX,[54] in which comments were ruled as protected expression of opinion made by a television announcer who said, following a report on a restaurant which served

hippopotamus, lion, and other exotic game, that "I take serious objection to serving up hippopotamuses and lions; I mean there must be enough food in the world, we don't have to eat them;" Underwood v. CBS, Inc.,[55] in which statements broadcast on a "60 Minutes" television segment recounting an anecdote concerning an alleged hoax accomplished by a reputed gangster were ruled as protected expression of opinion; Pesta v. CBS[56] regarding another "60 Minutes" segment entitled "Tragic Assumptions," the words, "critical mistake" used to describe a doctor's failed attempt to save a teenage patient, were ruled as protected expression of opinion. The court also ruled in Kurz v. Evening News Ass'n.[57] that failure to properly investigate does not constitute actual malice. Finally, in Action Repair, Inc. v. American Broadcasting Co.[58] constitutional protection was afforded to a television reporter's statements that viewers should heed the caution "Buyer Beware" when considering dealing with the appliance repair company identified during the broadcast and that people were choosing the wrong repair company when they chose this company. On the other hand, two recent rulings have found that a claim for libel was actionable. In one of those cases, Hellman v. McCarthy[59] writer Mary McCarthy was interviewed on the "Dick Cavett Show" and was asked by Cavett: "Who are some authors who are overrated, and we could do without . . .?" McCarthy replied, "Lillian Hellman, who I think is tremendously overrated, a bad writer, and dishonest writer." Cavett also asked: "What is dishonest about her?" McCarthy answered: "Everything. But I said once in some interview that every word she writes is a lie, including 'and' and 'the.'" In deciding the case against the news media, the court said "one must first determine whether the language complained of is susceptible of the particular defamatory meaning ascribed to it . . .." In this case the court ruled that "the libel

here labeling the plaintiff as a 'dishonest writer,' 'every word she writes is a lie' crosses the boundary between opinion and fact."

In a second case, Westmoreland v. CBS,[60] the court ruled that statements in a television broadcast which asserted that General William Westmoreland, serving as Army commander in Vietnam, prevailed upon his officers to draw dishonest conclusions and give false reports evaluating intelligence data, do not constitute protected statements of opinion. Despite the court's rulings, Westmoreland abandoned the action before the case went to the jury.

It is important to note that none of the broadcast cases utilized the four-factor test to distinguish between fact and opinion enunciated in Ollman. The chief reason that the test has not been used in broadcast commentary cases is that few have been decided since the Ollman case outlined the four factors in 1984. However, broadcast commentators should expect the Ollman four-factor test to play a key role in future cases involving broadcast commentary where allegedly libelous statements are disputed, especially since Ollman has been used in several recent cases involving disputed statements in magazines and newspapers.[61]

Conclusions and Recommendations

Political satire and broadcast commentary are American traditions that have enjoyed a considerable degree of constitutional protection. In fact, the U.S. Supreme Court has held that "one of the perogatives of American citizenship is the right to criticize public men and measures--and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[62] However, if the emotional distress claim in the Falwell case is allowed to stand by the U.S. Supreme Court, a new standard for liability could be established that would skirt around the "actual malice"

rule from the Sullivan decision and could make the four-factor or "totality of circumstances" test to distinguish between fact and opinion enunciated in the Ollman decision obsolete.

A dissenting justice in the Falwell case before the U.S. Court of Appeals, Fourth Circuit, perhaps said it best when he noted that the Court's decision to allow political figures to recover solely on the basis of hurt feelings brought on by critical commentary "surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all political debate."[63] All such judgments are premature, of course. The U.S. Supreme Court has yet to rule on the case, while the Ollman court has provided lower courts some guidance with respect to constitutional protection afforded to opinions.

An examination of recent broadcast cases therefore indicates that lower courts have devised a variety of ways to distinguish between fact and opinion, ranging from Ollman's four-factor test to Gertz dicta. In the majority of recent cases, the courts have relied heavily on dicta in Gertz which states that under the First Amendment there is no such thing as a false idea, thus extending protected expression of opinion to statements involving private individuals so long as matters of public interest are involved and the assertions are deemed expressions of opinion and not misstatements of fact.

In other cases, additional levels of analysis have been introduced to distinguish fact from opinion. Most often, this additional level introduces language from the Restatement (Second) of Torts, with the courts examining statements to determine whether they constitute pure opinion which is protected by the First Amendment, or mixed opinion, which is not. In still other cases, an evaluation of the meaning of the language used and a study of the context in which the statements appear is undertaken.

In the absence of a controlling Supreme Court decision, Ollman's four-factor test appears to contain a summary of the most-often used guidelines now employed by lower courts. Although Olman consolidates factors to be used in making the fact-opinion distinction, the courts frequently draw upon some, but not all, of the factors. What results is often a less-than-comprehensive test and a less-than-searching analysis of the fact-opinion distinction. With the fact-opinion distinction left to the vagaries of lower courts, broadcast commentators comment at some degree of risk although recent decisions have been decided heavily in favor of the news media, suggesting that broadcast commentary is a relatively safe haven from libel verdicts.

Still, there is reason for caution since one decision, for example, suggests that precautionary terms are helpful aids to the broadcast commentator, while another decision notes that a precautionary term such as "I think" is inadequate to afford the broadcast commentator constitutionally protected expression of opinion.

Furthermore, one law review article[64] suggests that the approaches the courts have taken in making the fact-opinion distinction vary greatly, ranging from judgment calls to careful examination of the "totality of the circumstances" surrounding the publication. Noting that no "bright-line rule" has been formulated, the writer suggests that "it is possible that no such rule will ever exist, if for no other reason than simply because of the diverse usage of words and language."

A second law review article critical of the Ollman four-factor test asserts that "factors like those used by the court in Ollman usurp much of traditional common law defamation by elevating those principles to constitutional standards."[65] Thus, with the smorgasboard of tests available for courts to use in making the fact-opinion distinction, it is possible that

broadcast commentators and newscasters, faced with such uncertainty, engage in self-censorship where there seems to be "close calls" in making the fact-opinion distinction.

What is known and helpful to broadcast commentators from recent cases is that the greatest degree of constitutional protection has gone to those whose program formats deal largely with opinion and investigative reporting. Recent decisions suggest, however, that in the absence of guidance from the Supreme Court, there is no guarantee an analysis that finds an allegedly libelous statement nonactionable in one jurisdiction would warrant the same disposition in another jurisdiction. Regardless, broadcast commentators and newscasters may take some small comfort in knowing that in recent cases involving libel claims in which the fact-opinion distinctin was at issue, news media defendants have won favorable decisions approximately eighty-two percent of the time.

Still broadcast commentators and newscasters would be well-advised to apply the Ollman four-factor test before they make statements they believe to be constitutionally protected expressions of opinion.

The National Association of Broadcasters' (NAB) guidelines[66] to distinguish fact from opinion go a long way toward protecting broadcast commentary from libel verdicts. NAB recommends carefully examining the meaning of expressions of opinion used and the context of the language surrounding those expressions of opinion. Commentaries and editorials should be promoted as special segments of the news, put in a regular time slot, and clearly identified as opinion on the television screen and in the script.

Statements should be verified before commentaries or stories are aired since case law proves that one cannot be successfully sued for opinion broadcasting unless the facts of a story are wrong. In addition, facts upon

which opinions are based should come before the expressed opinions in the script. Using cautionary language such as "I think" and "this reporter's opinion" helps identify statements as opinion.

Although broadcasters would be wise to restrain from using derogatory words such as "jerk" and "degenerate," such words are usually considered expressions of opinion, and the courts have said there is no such thing as false opinion. Legal problems arise, however, when a word is not clearly identifiable as fact or opinion, such as "incompetent" or "alcoholic." If facts are first given describing, for example, the subject's drinking habits and alcoholism treatment, using the term "alcoholic" to express opinion would be based on fact. Words that imply criminal activity, such as "fraud," "cheat," and "crook" should be avoided. When covering legal stories, the accurate legal terminology should be used; words such as "arraignment," "accused," and "convicted" have different legal meanings and could result in law suits if applied incorrectly.

When quoting others, first verify the accuracy of the statements and then use source attribution, such as "she said," "in his words," or "we quote." If the words are part of a public record, attribute them to the source.

Talent should be especially guarded with "happy talk," spontaneous comments, and humor, all of which may relay false facts. If reporters and anchors "thrust themselves" into a sensitive story with such comments as "keep after them," "well done," or "nice job," they are more likely to be sued with the station. The talent should refrain from giving personal opinions, such as "he should have to do time for that" or "the police shouldn't let her get away with that." If such comments are made, the statements may be neutralized by other talent saying "that's your opinion" or "he has never been found guilty of that in a court of law" to limit potential for damage. On sensitive and

"live" stories, it is best to know in advance what the questions and answers will be. Although courts have never addressed the issue of "tone of voice," editorial meaning can be conveyed through delivery so care must be taken to sound objective.

Most libel suits result from carelessness, such as incorrect synchronization of video and audio which may depict an individual in false circumstances. Careful examination of audio and video should be made so that impressions are accurate. Because careless use of generic or file footage also can create a false impression, this tape should always be used with caution and identified as such when it is used.

In a court of law, it helps to show that extra precautions were taken to be fair. Such preventive measures could go a long way toward making the broadcast commentary safe from libel verdicts.

NOTES

1. Falwell v. Flynt, 797 F.2d 1270 (4th Cir.), en banc rehearing denied, 805 F.2d 484 (1986).

2. 797 F.2d at 1273.

3. Ibid at 1276.

4. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). "The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

5. 750 F.2d 970, 11 Media L. Rptr. 1433 (D.C. Cir. 1984).

6. 376 U.S. 254, 279-80 (1964). For further discussion of the "actual malice" rule as it applies to the protection of opinion, see text accompanying notes 17-27, infra.

7. M. Newell, THE LAW OF DEFAMATION, LIBEL AND SLANDER 1 (1890). See also, Note, The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule, 72 GEORGETOWN L.J. 1817, 1819 (August 1984).

8. RESTATEMENT (SECOND) OF TORTS 566, Comment a (1977) hereinafter cited as RESTATEMENT.

9. 376 U.S. at 279-280.

10. 418 U.S. 323 (1974).

11. Ibid at 339-340. See also, RESTATEMENT 566, Comment c.

12. See, e.g., Note, The Fact-Opinion Distinction, supra note 2.

13. Overbeck, W., & Pullen, R. MAJOR PRINCIPLES OF MEDIA LAW. New York: Holt, Rinehart and Winston (1985).

14. RESTATEMENT OF TORTS 606, Comment c and d (2938).

15. RESTATEMENT 566, Comment b.

16. Veeder, V. Freedom of Public Discussion, HARV L. REV. 413, 419 (1910). See also, Note, The Fact-Opinion Distinction, supra note 2, at 1819-20.

17. See generally, Titus, Statement of Fact Versus Statements of Opinion--A spurious Dispute in Fair Comment, 15 VAND. L. REV. 1203, 1221 (1962). See also, W. Professor, HANDBOOK OF THE LAW OF TORTS 820 (4th ed. 1971).

18. See, e.g., Note, The Fact-Opinion Distinction, supra note 2, at 1821.

19. Gillmor, D., & Barron, J. MASS COMMUNICATION LAW 166 (4th ed. 1984).

20. Sack, R. LIBEL, SLANDER, AND RELATED PROBLEMS 154 (1980).

21. RESTATEMENT 566, Comment c.

22. RESTATEMENT 566, Comment c.

23. The Fact-Opinion Distinction, supra note 2, at 1822.

24. Ibid at 1824, citing Ollman v. Evans, 713 F. 2d at 844 (Robinson, C.J., concurring).

25. Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970); Old Dominion Branch No. 496, National Ass'n. of Letter Carriers v. Austin, 418 U.S. 264 (1974).

26. Eight of the twelve circuits had accepted the Gertz statement as controlling in reported cases through December 6, 1984. See Ollman v. Evans, 750 F. 2d at 974 n. 6.

27. The fourth annual fifty-state survey of libel and privacy law, which covered all developments through 1984, reported new cases in nine jurisdictions in 1984 alone. The survey also indicated that 12 other states continue to utilize the common law doctrine under the rubric of either "fair comment"

or "public interest involving public figures." That number had dropped from 15 reported in the 1983 survey. See, Issue Status Summary, LDRC 50-STATE SURVEY 767-770 (Libel Defense Resource Center, New York, 1984).

28. 750 F.2d 975.

29. Ibid at p. 970.

30. 105 S. CT. 2662.

31. 750 F.2d at p. 972.

32. Ibid at p. 972.

33. Ibid at pp. 977-978.

34. Ibid at p. 979.

35. Ibid.

36. Ibid at p. 981.

37. Ibid at p. 979.

38. Ibid.

39. Ibid at p. 980.

40. Ibid at pp. 987-989.

41. Ibid at pp. 989-990.

42. Ibid at p. 987.

43. Lauderback v. ABC, 10 Media L. Rptr. 2241 (8th Cir. 1984).

44. Ibid at 2241.

45. Ibid at 2245.

46. Spelson v. CBS, Inc., 10 Media L. Rptr. 1608 (D.C. Ill 1984); 11 Media L. Rptr. 1900 (7th Cir. 1985), aff'd.

47. Ibid at 1610.

48. Ibid.

49. Ibid at 1613.

50. Redco Corp. v. CBS, Inc., 10 Media L. Rptr. 1536 (D.C. Pa. 1984); 11 Media L. Rptr. 1861 (3rd Cir. 1985), aff'd; cert. denied, 54 U.S.L.W. 3208 (1985).

51. Hallmark Builders v. Gaylord Broadcasting, 10 Media L. Rptr. 1981 (11th Cir. 1984).

52. Leader v. WSM, Inc., 10 Media L. Rptr. 1343 (Tenn. Cir. Ct. 1985).

53. Motsinger V. Kelly, 11 Media L. Rptr. 2459 (Va. Cir. Ct. 1984).

54. New Deal Restaurant v. WPIX, 11 Media L. Rptr. 1246 (Cal. App. 1984).

56. Pesta v. CBS, 13 Media L. Rptr. 1828 (1986).

57. Kurz v. Evening News Ass'n. 144 Mich. App. at 212.

58. Action Repair, Inc. v. American Broadcasting Co., 776 F.2d 143 (7th Cir. 1985).

59. Hellman v. McCarthy, 10 Media L. Rptr. 1789 (N.Y.S. Ct. 1984).

60. Westmoreland v. CBS, Inc., 10 Media L. Rptr. 2417 (D.C. N.Y. 1984).

61. See, e.g., Scott v. News-Herald, 13 Media L. Rptr. 1241 (Ohio Sup. Ct. 1986); Janklow v. Newsweek, 12 Media L. Rptr. 1961 (8th Cir. 1986); El Paso Times v. Kerr, 13 Media L. Rptr. 1040 (Texas Ct. App. 1986).

62. Baumgartner v. United States, 322 U.S. 665, 673-74 (1944).

63. Falwell v. Flynt, 13 Media L. Rptr. 1672 (Wilkinson, J., dissenting).

64. Moll, L. 1985. Defamation--Actionable Statement of Fact Versus Privileged Opinion: Ollman v. Evans, 34 KAN. L. REV. 367, 377.

65. Becker, D. 1986. Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of Ollman v. Evans, 71 IOWA L. REV. 913.

66. Staying Out of the Libel Stew, National Association of Broadcasters (1986).